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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Fourteenth session

SUMMARY RECORD OF THE 19th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 13 May 1996, at 10 a.m.

Chairperson: Mr. ALSTON

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Any corrections to the records of the meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

GE.96-16522 (E)

The meeting was called to order at 10.30 a.m.

ORGANIZATION OF WORK (continued) (agenda item 2)

Meeting with the High Commissioner for Human Rights

1. The CHAIRPERSON gave a brief account of the discussion the Committee's delegation, composed of members of the Bureau and Mr. Simma, had had before the meeting with the High Commissioner for Human Rights. It had repeated the request the Committee had made for years, namely, that it absolutely must have expert assistance in order to carry out its work properly. The High Commissioner had explained that the current reorganization of the Centre for Human Rights was horizontal rather than vertical, in other words, the plan was to set up a unit to provide any committee or other body with back-up in their research work. The Committee on Economic, Social and Cultural Rights would therefore also benefit from unit's services. The reorganization should be completed by 1 October 1996.

2. The only point on which all were agreed was how very inefficient and obviously inadequate the existing structure was. For the rest, the delegation had received little assurance from the High Commissioner and could only hope that the services provided by the reorganized Centre for Human Rights would better respond to the Committee's needs.

3. Attention had also been drawn to the fact that the study of economic, social and cultural rights, which differed in many respects from everything done at the Centre for Human Rights, required the assistance of specialists well acquainted with the subject. No specific answer had been given on that point.

4. There was no doubt that consideration of the question should be pursued and that the Committee should tackle the matter at its next session as soon as the results of the reorganization were discernible. The Committee should also provide the secretariat with a clear indication of what exactly it expected of it and should also report to the High Commissioner. For the moment, the Committee had no alternative but to make do with the assurances it had been given.

5. Mr. SIMMA explained that the High Commissioner was unable to comply with the Committee's request as it was not consonant with the current reorganization. The Committee would have to "play along". He proposed that, at the end of September, the Committee should tell the Centre exactly what its needs would be at the next session in the light of the countries whose reports it would be considering, and see how the new procedure set up could support it.

6. The CHAIRPERSON, noting that the members of the Committee did not wish at that point to comment further on the matter, suggested that for the time being it should accept the proposals he and Mr. Simma had just made.

7. It was so decided.

GENERAL DISCUSSION: "DRAFT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS" (agenda item 5)

Report submitted by Mr. Alston (E/C.12/1994/12)

8. The CHAIRPERSON said that he had submitted one written report on the draft optional protocol (E/C.12/1994/12) and would be submitting another at the Committee's next session. He hoped that a final report could be submitted to the Commission on Human Rights for consideration at its fifty-third session, in 1997.

9. Commenting on the very fruitful discussion on the subject that had taken place at the previous session, he said that ILO and several non-governmental organizations had made some highly pertinent remarks. Even though the discussion on the draft protocol had not answered all the main issues, it had highlighted some matters of concern to members of the Committee and taken up subjects which would be of major interest later. He would take them into account in his new report.

10. Contrary to the argument put forward by the ILO representative, several NGOs, including the American Association of Jurists, had considered that the scope of application of the procedure for the submission of communications should be broadened beyond what he had initially planned to enable NGOs that were not directly involved as victims of a human rights violation to submit a complaint. Such a procedure would go far beyond that provided for under the European Social Charter. In practice, Governments were extremely reluctant to adopt such an open procedure, and the Commission on Human Rights would not welcome such a draft. The maximalist approach therefore was not advisable, in his view.

11. Nor, because of their reluctance, was the minimalist approach - meaning the procedure Governments would be ready to accept. Between the two extremes lay an intermediate solution that he would recommend and that would require clarification. But it was for the Committee to choose between the three possibilities. He invited members of the Committee, observers and NGO representatives to express their views on the matter, taking care to disregard the political dimension of the Committee's work, although members were, above all, experts. The task before the Committee, therefore, was to decide whether the procedure for filing complaints would be open to all NGOs without restriction or whether they should comply with certain conditions - for instance, that they should be established in the country concerned, have a connection with the violation committed, or enjoy consultative status.

12. The American Association of Jurists had also raised the possibility of States submitting complaints. It was his impression that that option was not of particular interest to the Committee, for two main reasons: first, States could submit to the Commission on Human Rights complaints that could relate, inter alia, to economic, social and cultural rights and, secondly, the procedures for complaints between States had never really been applied in the human rights field. He invited the Committee to give him its views on the matter.

13. The American Association of Jurists had further suggested that international financial institutions, among others, could be the subject of complaints. Although he was not opposed to the idea in principle, he personally could not endorse the legal basis for such an analysis. In his view, the Committee could not, in law, ask the World Bank or IMF to give an account of their activities vis-à-vis the Covenant; in the case of those institutions, some other course should be followed.

14. From the legal standpoint he supported the principle of international solidarity and joint responsibility in the matter of violations of the economic, social and cultural rights, as referred to by the American Association of Jurists and would like to see the Committee steer its thinking along those lines. But that would not be a pragmatic approach and States would be strongly opposed to it.

15. A non-governmental organization of jurists from Catalonia had said that it was very much in favour of the draft protocol and had supported some of the ideas put forward by the American Association of Jurists. It had suggested, among other things, that the Committee's capacity to declare a communication inadmissible should be strictly limited. In his own view, the reply to that question should not be fixed in the protocol once and for all but should evolve with the Committee's rules of procedure. Another non-governmental organization, the FIAN - Foodfirst Information and Action Network - was very much in favour of the draft protocol and endorsed the maximalist solution.

16. Another fundamental question to keep in mind, but one to which there had as yet been no answer, was whether, in the event of a presumed violation, all rights could be the subject of a procedure and to what extent. Mrs. Jimenez Butragueño had referred in that connection to the fall-back in the level of social welfare protection throughout the world. The Committee could not, of course, approve of that, but it could not ignore the facts either. In that connection, Mr. Adekuoye had pointed out that countries did not have the same financial capacity to ensure respect for a given right, Mr. Ceausu had referred to article 2, paragraph 1, of the Covenant under which States undertook to take steps "to the maximum of [their] available resources", which provided a partial reply to that vital question. Mr. Ceausu had also proposed that States should be offered the possibility of expressly choosing those rights laid down in the Covenant in respect of which they would accept complaints.

17. In many respects, the draft optional protocol providing for the submission of communications which was being considered by the Committee on the Elimination of Discrimination against Women could be compared to the draft protocol under discussion. Judging by the reaction of a number of Governments, there again it was important not to go too far or too hastily. After summing up the positions of the NGOs, commenting on the progress of work in drafting an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and recalling a number of comments made by the Committee at its thirteenth session, he went on to inform the Committee of his own views in the matter. Mrs. Jimenez Butragueño had brought up the question of the economic crisis being experienced by many States and the resultant reductions in social welfare expenditure. It was true that, notwithstanding the good intentions of Ministries of Labour and of Health,

it was the Ministry of Finance which nowadays had the last word in many countries. It should therefore be borne in mind that States would be hesitant about any commitment that might restrict their freedom of action in the economic field. Another idea put forward by Mr. Ceausu was that the optional protocol could deal solely with certain rights or certain degrees of realization of those rights and that States could undertake to accept obligations in respect of some rights only, even if the number of such rights was increased later. The objection to that was that, if the content and scope of the rights in the optional protocol were of less importance, States would tend to regard the protocol as the norm and to disregard the obligations set forth in the Covenant. That objection could, however, be rebutted by certain arguments, namely, that there were already international instruments to which States could accede while formulating reservations and also that the optional protocol would meet an entirely different objective from the Covenant and, therefore, could not be dealt with on the same level.

18. In his view, if it was decided that the optional protocol should deal solely with certain rights or with a hard core of rights, or with certain aspects of the rights, the question that arose was whether article 1 of the Covenant, on the rights of peoples to self-determination, or article 2, on non-discrimination, or even the first six articles of the Covenant, should be dealt with separately. The question would also arise whether a distinction should be drawn between the various rights set forth in article 11, namely the right of everyone to an adequate standard of living, including food, clothing and housing. Similarly, could or should the right to education be subdivided into rights to a primary education, a secondary education, and a higher education? Moreover, allowing States to choose for themselves the rights they undertook to realize could make for easy solutions: some States might accept the communications procedure only with respect to rights that were somewhat ill-defined or relatively easy to implement, such as the right to work or the right to social security. It was also conceivable that some rights, such as the right to non-discrimination under article 2 of the Covenant, would be forced on all States without exception in conjunction with the other rights.

19. Another point that called for reflection concerned the interpretation of the obligations incumbent on States. During informal meetings he had held with representatives of various States, he had noted that Governments feared that the Committee might interpret the right to food in a way that would be starving or ensuring that everyone had a balanced and varied diet? And in the case of the right to education, would States find themselves being reproached for not gradually introducing free higher education, when they had to increase university fees because of economic difficulties? Such fears acted as an inducement to limit the content of the rights in order to arrive at a minimum content. But while such a limitation might be conceivable intellectually it would not be easy to put into practice. For example, in the case of the right to education it was simple to distinguish between different levels of education - primary, secondary and higher - but the same could not be said of the right to adequate housing, for which it would be difficult to arrive at a minimum standard with which States would have to comply. One answer to the problem would be for the Committee to draft a general observation on the

content of minimum rights, or of a hard core of rights, or even for it to gradually refine its interpretation of the rights, as the Human Rights Committee did.

20. In general, he had no definite position on the various questions he had raised. He opened the discussion on the draft optional protocol providing for the consideration of communications.

21. Mr. WIMER ZAMBRANO said that the Chairperson's introductory statement with its wealth of ideas had opened up many avenues for reflection. He suggested that the Committee should first hear the non-governmental organizations and then hold a discussion based on a few topics.

22. The CHAIRPERSON invited non-governmental organizations to state their views.

23. Mr. TEITELBAUM (American Association of Jurists) said that he had already spoken at length on the draft optional protocol providing for the consideration of communications during the discussion on the draft held at the Committee's thirteenth session; in that connection he would refer members of the Committee to summary record E/C.12/1995/SR.50. His statement would therefore pursue the arguments already advanced but would include new ones. The effective implementation of the future protocol was of paramount importance, in the opinion of his organization.

24. He wished to stress five main points in particular. First, to save time but also because most of the rights enshrined in the Covenant were essentially collective rights, the Committee's main task, once the protocol came into force, would be to consider the situations that appeared to reveal a collective, generalized and/or systematic violation of one or more of the rights set forth in the Covenant, in accordance with a procedure based on that laid down in Economic and Social Council resolution 1503 (XLVIII). The Committee should also examine individual complaints when the gravity of the facts reported and/or the extent to which an individual case could be indicative of a generalized situation justified the intervention of the Committee.

25. Second, it would be advisable if, in addition to the victims and their representatives, NGOs and other organizations could be authorized under the draft protocol to submit complaints or denunciations. Certain regional instruments, such as the Additional Protocol to the European Social Charter approved in 1995, already provided for that option, which also existed in some ILO and UNESCO mechanisms. The tendency to broaden the participation of the NGOs could also be seen in the work of the Human Rights Committee and even the Committee on Economic, Social and Cultural Rights. Moreover, article 44 of the American Convention on Human Rights conferred on every non-governmental entity the right to submit to the Commission petitions containing denunciations or complaints. Consequently, it would certainly not be maximalist to allow the NGOs to submit complaints. Indeed, to deprive them of that right would be a step backwards compared to the tendency seen throughout the international organizations. It should be noted in that connection that,

at the ILO, the categories represented - employers, workers and States - were not the only ones that could submit complaints, national trade unions also being authorized to do so.

26. Third, States too should be empowered to submit complaints in line with a procedure similar to that provided for under the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. States should also be able to bring proceedings for violations that took place on their own territory. For instance, a transnational corporation could be more powerful than the State on whose territory it was established and the State might have need of an international body to defend itself against that corporation. Given that States were the signatories of the Covenant, it would be paradoxical to exclude them from the complaints procedure. Furthermore, States were the main subjects of international law and it would therefore be contrary to the law and unreasonable to exclude them from the procedure set up under the protocol.

27. Fourth, having regard to articles 18 and 19 of the Covenant and to paragraph 97 of the 1979 report of the Secretary-General (E/CN.4/1334), his Association trusted that it would be possible to submit complaints against international financial institutions and other organizations in the United Nations system. That could perhaps be achieved through an extension of the jurisprudence of the International Court of Justice.

28. Fifth, paragraph 1 of article 1 of the draft optional protocol, whereby communications could be submitted only by individuals or groups subject to the jurisdiction of the State responsible for the presumed violations, was not acceptable. True, there was a similar provision in the Optional Protocol to the International Covenant on Civil and Political Rights but the Human Rights Committee had had to circumvent that obstacle to its activities through a series of decisions as explained in detail at its latest session. Furthermore, the American Convention on Human Rights contained no such restriction and the Additional Protocol to the European Social Chapter applied it only to national organizations. It was inconceivable, at a time of globalization of the economy, that economic, social and cultural rights could be considered within the limits of the jurisdiction of one State.

29. His viewpoint could be underpinned by a scrutiny of the mechanism of transnational corporations. In a report entitled "World Investment Report - Transnational Corporations, Employment and the Workplace" (United Nations publication, Sales No. E.94.II.1.14, pp. 251-253), UNCTAD stated that, in the peripheral countries in particular, those corporations restricted the collective bargaining power of the workers they employed by threatening to leave if the claims of those workers were, in their opinion, excessive. Moreover, sometimes, States stimulated foreign investment by restricting trade union rights. For instance, in its 1995 annual report, the International Confederation of Free Trade Unions severely criticized the labour situation in the free zones in a number of countries. Also, in the ILO magazine "The World of Work" No. 10, December 1994, p. 13, the Secretary-General of the International Union of Food and Allied Workers

Association stated that low wages, poor working conditions and, for many part-time workers, a total lack of basic social welfare were features of employment in firms such as Kentucky Fried Chicken and MacDonald's.

30. At the meeting of the Commission on Human Rights on 28 March 1996, the representative of Nicaragua had stated that the Ministers of Labour of the Central American countries had adopted the Montelimar Declaration on 7 and 8 March 1996, denouncing offences against labour law and infringements of human rights committed by various transnational corporations established in free zones (E/CN.4/1996/SR.17, para. 30).

31. The Argentine Supreme Court, in the Swift-Deltec case in 1973, had ruled that, if a subsidiary went bankrupt, the effects of that bankruptcy should extend to the parent company, which must face up to its responsibilities. Similarly, it was clear from the jurisprudence of the Court of Justice of the European Communities that fines for breaching the rules of competition applied to a subsidiary having the nationality of a member State must be imposed on the parent company which had the nationality of a third State. In his view, therefore, it was wrong to have provided in the draft optional protocol that complaints or communications could be submitted only by individuals or groups subject to the jurisdiction of the State that was the object of the complaint. There should be no jurisdictional or territorial limit, and the optional protocol could draw on article 44 of the American Convention on Human Rights, which stated that any person or group of persons could bring a complaint before the Inter-American Commission on Human Rights for violations of the Convention by a State party. Accordingly, the responsibility for any violation of the rights set forth in the Covenant should be apportioned as between the State where such violations occurred and the transnational corporations or third States which contributed, by their decisions, to such violations.

32. He therefore suggested that, in article 2, paragraph 1, of the draft, a phrase along the lines of "... and any non-governmental entity legally recognized in one or more States parties ..." should be added after the words "Any individual or group claiming to be a victim of a violation". Furthermore, article 3, paragraph (a), lacked clarity since it implied that, for a communication to be declared admissible, there had to be a finding that there had been a violation of the rights recognized under the Covenant, whereas legal logic dictated that such a finding should be the result of the procedure provided for in the protocol, and not the contrary. In article 8 of the draft, the word "remedy" should be understood to mean measures designed, on the one hand, to put an end to the violation in question and, on the other, to ensure full reparation for the damage caused by that violation.

33. The protocol should refer to all rights, for he did not see how it would be possible to choose among them and "haggle" with member States already inclined to violate those rights. He was not, of course, forgetting General observation No. 3, according to which States had to implement those rights to the extent of their available resources.

34. Mr. FERNANDEZ (International Organization for the Development of Freedom of Education (OIDEL)) said his organization was convinced that adoption of the protocol would do much to promote the realization of the economic, social and

cultural rights. The dignity of the lives of millions of persons depended upon it. Death from starvation was just as unacceptable as violent death and a delay in the adoption of the protocol would, in a sense, mean becoming an accomplice in the destitution, distress and death of human beings. What was required, therefore, was a political decision. OIDEL considered that the draft protocol was excellent and that the discussion in the Committee should be closed as quickly as possible so that the draft could be placed before the Commission on Human Rights as soon as possible. The time had come to work with States so that the draft protocol would become a reality and its basic provisions would be preserved, namely, the provision affirming the right of an individual or of a group to submit a written communication to the Committee and obliging States parties to take all steps necessary to enable any complainant to submit communications (art. 2, para. 2); the provision on the competence of the Committee to examine a communication when the procedure of international investigation was unreasonably prolonged (art. 3, para. 3 (b)); the provision whereby the Committee could request the State to take interim measures to preserve the status quo or to avoid irreparable harm (art. 5, para. 1); and the requirement that States should take all steps necessary to remedy any violation of the rights recognized in the Covenant (art. 8, para. 2).

35. OIDEL hoped that the Committee would not be led astray by two mirages - the non-justiciability of economic, social and cultural rights, which was the same argument as that used long ago to prevent women from voting and to deny Africans human dignity, and the impossibility of finding valid indicators to examine progress towards the realization of those rights. In that connection, he would refer the Committee in particular to UNDP's human development index. OIDEL was ready to join with the Committee in efforts to persuade governments to adopt the draft protocol. OIDEL coordinated a working group composed of various non-governmental organizations, UNDP, the InterParliamentary Union, academics and foundations.

36. Mr. SIMMA said that, thus far, the Committee's approach to the implementation of economic, social and cultural rights had been not so much maximalist as optimal. Therefore, an optimal, or a more modest, approach had to be chosen. A genuine "division of labour" was needed as between States, diplomats, governmental experts and independent experts. The task of the Committee was not to play a political role, but it should aim at improving and expediting the procedures and at innovation. He favoured a more modest approach to the application of economic, social and cultural rights since what he had heard from senior government officials about the draft protocol was negative. Those officials spoke of the particular nature of economic, social and cultural rights: unlike civil and political rights, which cost the State nothing, they had significant financial implications. He was also in favour of allowing States to give preference to certain rights over others - for instance, in the case of article 11, to the right to food rather than the right to housing. The option of defining the minimum core content of each right set forth in the Covenant would lead to erosion of the Covenant. Instead, therefore, he favoured the idea of allowing States to give preference to some rights over others, in accordance with their possibilities.

37. The CHAIRPERSON said he hoped that Mr. Grissa would speak at greater length on the concept of non-discrimination set forth in article 2 of the Covenant, later in the session.

38. Mrs. TAYA said that, if non-governmental organizations were to be excluded from communication procedures under the optional protocol, it would be better not to have a protocol at all.

39. Furthermore, while the World Bank was becoming increasingly concerned with human rights in its development programmes and the developing countries were becoming increasingly dependent on international financial institutions, the Committee's final observations were addressed not to the World Bank or the International Monetary Fund but only to States parties. It would be better to help those institutions to contribute to the effective realization of economic, social and cultural rights, as provided for in article 22 of the Covenant. In that connection, the non-governmental organizations were in a position to provide information on the activities of financial institutions. If the protocol allowed for the exclusion of non-governmental organizations from the communications procedure, another type of procedure should be contemplated with a view to improved application of article 22 of the Covenant.

40. Mr. ALVAREZ VITA said that he was very much in favour of the adoption of an optional protocol as he had himself made such a proposal for the first time at the Committee's third session. At the same time, some of the questions raised left him with the impression that the discussion was moving backwards instead of forwards; that applied, for example, to the idea of giving priority to certain rights and the degree of scepticism about the acceptability of the protocol to developed countries.

41. The participation of NGOs in the activities of the Commission on Human Rights, the Committee on Economic, Social and Cultural Rights and other human rights bodies was essential. As pointed out by the International Organization for the Development of the Freedom of Education, by delaying the adoption of the protocol the Committee would be contributing to the poverty of society and the death of many human beings. The Committee had procrastinated too much; it should now move ahead, towards the adoption of an optional protocol. He fully supported the position of the American Association of Jurists.

42. He suggested that the Committee should consider incorporating in the protocol an article based on article 41 of the Covenant, in which the protocol would allow States parties complete latitude in deciding the extent to which NGOs could participate in the implementation of the Covenant. Such a solution would offer a way out of the problems of NGO participation so that an acceptable draft could be submitted rapidly to the Commission on Human Rights.

43. Mr. RATTRAY thanked the Chairperson for laying the groundwork for considering an extremely difficult and complicated matter and said he was grateful to the NGOs for their statements. A system for the submission of communications would make it possible to check more effectively that States parties were complying with their obligations under the Covenant. The nature of the obligations on States parties was, however, a relatively new subject, from the substantive standpoint, and the Committee would be able to establish

its own jurisprudence only slowly, gradually finding answers in that connection. For instance, the Committee had in the past adopted various formulas such as "minimum core obligations" which had reflected the difficulty of defining universal norms or even local country norms. The Committee must satisfy two essential requirements: on the one hand, it must define minimum standards for economic, social and cultural rights that were applicable to all individuals and, on the other, it must respect the right of developing countries, recognized under the Covenant, to determine the extent of the rights they could guarantee. In that regard, the protocol should not be allowed to become a tool for monitoring or evaluating the efficiency of the developing countries. Before the protocol came into force, certain qualitative questions should be settled, bearing in mind that the protocol would be credible and carry weight only if it had a universal character, in other words, if it had been ratified by a number of representative States from the developed countries and the developing countries as well as from the different regions of the world.

44. He was not sure that States would continue to cooperate with the Committee openly and sincerely once the protocol was adopted. They might be afraid, in doing so, of justifying in advance the complaints that might be submitted to the Committee by individuals under the protocol and even of encouraging potential complainants. As to choosing between maximalist and minimalist standards in the observance of economic, social and cultural rights, account should be taken of the scope of the protocol - in other words, of the rights that would or would not be covered - and of the exercise of the right to submit complaints to the Committee. If local standards were adopted it would be necessary to ensure that the procedure was used lawfully and with good reason and also to determine who could submit a communication and on what basis. NGOs should not be able to submit communications independently but should do so on behalf of individuals who complained of a violation. It would also be necessary to decide whether isolated violations of individual rights would be admissible or whether the procedure for the submission of communications should be confined to systematic violations.

45. As to the possible exclusion of certain articles, it was absolutely essential to keep article 2, which was the general provision on non-discrimination, for deleting it would diminish the very essence of the rights set forth in articles 6 to 15 of the Covenant.

46. Even if international financial institutions were not parties to the Covenant and, therefore, could not in principle be covered by the procedure for appeals to the Committee, it followed from the general provisions of the Charter of the United Nations that those institutions should be held responsible for any international effects their policies might have. On the whole, provided certain precautions were observed, he favoured the adoption of an optional protocol to strengthen the system used and to ensure the implementation of human rights.

47. Mrs. JIMENEZ BUTRAGUEÑO said she endorsed the thrust of the observations made by Mr. Simma and the other members of the Committee. In the light of all that had been said, the various elements of the proposed optional protocol should be considered article by article.

48. Mr. WIMER ZAMBRANO said he believed that the difficulties encountered by the Committee lay partly in the extremely heterogeneous character of the articles in the Covenant, which were in principle indivisible but to which all experts did not accord the same importance. He further believed that, despite the differences between the maximalist and the minimalist view concerning the future protocol, the members of the Committee favoured NGO participation on conditions that still had to be determined but particularly with reference to their reliability, representativeness and credibility, and bearing in mind that NGO action in the human rights field was essential.

49. The representative of the American Association of Jurists, who had proposed that violations should be classified according to their nature, had made a very interesting statement. It would, however, be preferable to draw a distinction between rights that could be invoked before the courts and other rights. Account should also be taken of the nature of the violations and the importance of each article in the Covenant.

50. Mr. ADEKUOYE said that, in the interests of balanced ratification of the Covenant by both the developed and the developing countries, account should be taken of the priorities set by Governments and in particular by those of the developing countries which might decide to favour some sectors over others. Certain economic, social and cultural rights in non-priority sectors for the developing country concerned might, then, turn out not to be applied.

51. It would also be necessary to decide on the body or mechanism that would ensure the application of the rules for the submission of communications under the protocol and to make sure that international NGOs would not be a tool for international interference in the internal affairs of the developing countries to the detriment of their sovereignty. The right to submit communications under the protocol should also be assigned to NGOs and national interest groups.

52. The Committee should give top priority to the provisions on non-discrimination, which constituted the linchpin of all the rights enshrined in the Covenant. It should also be possible to bring a complaint under the protocol against States which could prevent other less powerful States parties from complying with their obligations under the protocol, by imposing international measures such as embargoes, as well as against international financial organizations such as the World Bank and the International Monetary Fund, whose restrictive financial policies could adversely affect the application of the Covenant.

53. The CHAIRPERSON said that the general debate would continue at the following meeting, when more NGOs would speak.

The meeting rose at 1 p.m.

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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Fourteenth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)*
OF THE 20th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 13 May 1996, at 3 p.m.

Chairperson: Mr. ALSTON

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GENERAL DISCUSSION: "DRAFT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS"

* The summary record of the second part (closed) of the meeting appears as document E/C.12/1996/SR.20/Add.1.

This record is subject to correction.

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Any corrections to the records of the public meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

GE.96-16252 (E)

The meeting was called to order at 3.15 p.m.

GENERAL DISCUSSION: "DRAFT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS" (agenda item 5) (continued) (E/C.12/1994/12)

1. Mr. KOUZNETSOV said that as the Committee approached the concluding stages of its consideration of the draft optional protocol, it was important to decide to what extent its text should take account of the "government factor" and of the experience acquired with previous international procedures. In his view, the second approach should be adopted as far as possible, without overestimating what could be done or the degree to which influence could be exerted over Governments. The Committee should take account of the possible reaction of Governments to individual provisions of the draft optional protocol, but its main task was to ensure that the instrument was commensurate with other international procedures already in effect.

2. It was also important to define those who would be able to use its procedures. There were some legal systems in which one's personal rights must be affected before one could institute legal proceedings; there were others in which it was sufficient merely to want to see law and order maintained and there was no need for one's own rights to be directly affected. He preferred the latter approach, which in his view was more democratic, more advanced and more in keeping with the spirit of the Committee's work. However, it must be borne in mind that NGOs also had the right to use the procedure. Provision should be made for individuals and groups of individuals to submit complaints if they felt that their rights had been infringed.

3. What the Committee was considering was an optional protocol to the Covenant as a whole; it should relate to all parts of the Covenant, and not only to articles 6-15. It was, in any event, fairly easy to predict which Governments would take a positive view of the Optional Protocol and which would adopt a more reserved approach and enter reservations. He agreed that the Committee needed to set aside time at its fifteenth session for an article-by-article consideration of the text, so that it could be submitted to the Commission on Human Rights by the end of the year.

4. Mrs. JIMENEZ BUTRAGUEÑO said she no longer had any concern about the inclusion of articles 1 and 2. The introduction to the draft optional protocol should not fail to take account of the Beijing Platform for Action. However, she was not happy with the wording of the proposed text of article 1 contained in paragraph 18.2 of the draft optional protocol (E/C.12/1994/12), which seemed to give the Economic and Social Council the opportunity to designate another body to carry out the functions assigned to the Committee.

5. Mr. DIENG (International Commission of Jurists) said that the principle of non-discrimination contained in article 2 of the Covenant was fundamental, and he had been somewhat concerned to hear mention made of States being given the opportunity to choose or restrict the scope of certain rights. The Committee should be careful about such a step. Economic, social and cultural rights were still the poor relations of human rights, and more than half of mankind did not fully enjoy them, because of either a lack of political will or the inequality in international relations.

6. The Chairperson had referred to the possible exclusion of NGOs from the complaints procedure, the classification of rights and limitation of their scope, and their justiciability. He had suggested that the Commission on Human Rights might not accept a maximalist position on the optional protocol, but surely the Committee's strength was that it was a body of independent experts, while the Commission was a political body and one that had not always done justice to economic, social and cultural rights. It would be wiser for the Committee resolutely to draft an optional protocol which was not minimalist but realistic and which sought to obtain as much as possible. It was extremely important for the Committee to resist the temptation to retreat. Sometimes regional bodies were bolder than universal bodies; the Committee should be mobilizing all NGOs in order not to betray the aspirations of one half of mankind. Even the African Commission for the Promotion and Protection of Human Rights was now able to receive complaints from individuals and groups regarding violations of economic, social and cultural rights; he cited a recent decision by the Constitutional Court of Benin on the right to work in which the reference had been made to the Covenant.

7. The issue of reservations was even more difficult for the Committee than it was for the Human Rights Committee, because article 2 of the Covenant stated that the rights recognized therein should be realized progressively and to the maximum of available resources. In his view, resources were often not used effectively enough, and the wording of article 2 should be made more specific. The Committee should maintain the revolutionary spirit for which it was renowned. There was no denying that there were still many countries in which economic, social and cultural rights were not justiciable; the Committee should be a source of inspiration for regional human rights bodies and take the revolutionary path that had the support of the NGO community.

8. Mr. AHMED agreed with what Mr. Simma, Mr. Rattray and Mr. Adekuoye had said at the previous meeting, but he had always had doubts about the necessity of the optional protocol and its timeliness. The Covenant was a good instrument which was functioning very well, and, apart from anything else, he doubted whether the Committee could cope with the added work and scrutiny involved in an optional protocol. He had a number of troubling questions to which he had received no satisfactory answers.

9. If those States parties that had presented reports in which they had acknowledged violations of the Covenant were to sign the optional protocol, they would run the risk of being called before the Committee to answer accusations of those violations. The only real option for a country that acknowledged violation of the right to work, for example, would be to refrain from signing the optional protocol in the first place, which left it effectively non-existent. He fully expected that there would be very few signatories, and possibly none at all; if that happened where would it leave the Committee? What inducements or benefits were there to States, which were neither altruistic nor chivalrous but selfish and realistic, when there was the possibility of the optional protocol being manipulated by inimical political hands in order to exert pressure on them? Any disgruntled group of persons with legitimate complaints about violations of rights under the Covenant could bring any country before the Committee at six-monthly intervals. Why would States parties to the Covenant take on the unnecessary

burden of acceding to the optional protocol? It was not absolutely necessary; it was impractical and unrealistic, and fraught with pitfalls. States had serious misgivings about it, and their fears needed to be alleviated. If the Committee simply had to adopt the optional protocol because it needed to win some kind of competition with other human rights committees, it should tread lightly and take the minimalist approach, and not scare off States parties.

10. Mr. THAPALIA said that the sooner the Committee adopted the draft optional protocol the better, if it was to avoid losing its position as leader among the human rights bodies. However, a number of points remained to be considered. Not all States had ratified the Covenant and even some of the States parties had not yet submitted reports. It was not the Committee's business to make States reluctant to ratify the Covenant; the goal was to make it universal. Although it was easy for Governments to make commitments, in the case of the developing countries the fulfilment of their obligations was often made difficult, by their inefficient bureaucracies, heterogeneous societies and hard-pressed economies. Some qualification should be agreed on in the case of NGOs, which should be committed to the development of their national societies, and especially the more vulnerable groups. Finally, priority should be given to the right of non-discrimination.

11. Mr. SIMMA said he had been impressed by some of the arguments put forward by Mr. Dieng but felt he had to play the devil's advocate with regard to access by NGOs. The only solution would be one that called for NGOs to be direct victims before they had access to the individual petitions procedure. Any wider access would lead to an absolute refusal by Governments to subscribe to the procedure. A distinction must be made between legal and political procedures, and in such a context open access by NGOs in the manner outlined at the previous meeting was simply impossible.

12. With regard to the question of the liability of international organizations, especially the international financial institutions, they could not regard themselves as being under no commitment with regard to human rights, because the International Bill of Human Rights informed and guided the entire United Nations system and every institution within it. However, in the context of the draft optional protocol, the matter must be dealt with in a legal fashion: in other words, it must be established beyond doubt that the policy of an international organization was in open and clear contradiction to human rights; it would not suffice if the international organization had through its policy contributed to government action which had in turn violated human rights.

13. The International Law Commission had spent many years debating the circumstances under which States could be held responsible for infringements of international law by other States, and in the course of its deliberations had steered a somewhat restrictive course; if the Committee were to take up the question in its optional protocol it would have to do likewise. From the standpoint of political feasibility, the question of non-discrimination could be made justiciable only with respect to those rights in relation to which a State had subjected itself to the procedure, and not across the board. The acceptability of the optional protocol would be endangered if it encompassed across-the-board non-discrimination.

14. The discussion of the coverage of articles 1 to 5 really turned on whether the right to self-determination could be covered by the optional protocol only in so far as violations entailed very specific infringements of economic, social and cultural rights by individuals who might then bring individual communications. If, by including article 1 in the scope of the optional protocol, the entire question of self-determination was included, there would be a grave danger of the procedure being alienated and used for other purposes. Like Mr. Ahmed, he would see nothing wrong if, instead of developing an optional protocol which was then ratified by no State parties, the Committee developed further its quasi-judicial procedures by focusing on more efficient follow-up to State reports and on methods by which it could more constructively take up such issues as housing problems. Rather than drawing up an optional protocol, handing it to the Commission on Human Rights and then to Governments which would dilute it, the Committee could on its own develop further the incremental approach through which it had achieved a good deal in recent years.

15. Finally, he did not see how it would be possible at the fifteenth session to find time to discuss the draft optional protocol thoroughly; it might be better to reduce the list of reports by one or two so as to create time to conclude a discussion which had been under way since 1988.

16. Mr. TEITELBAUM (American Association of Jurists) said that, despite the obvious risks and difficulties of framing an optional protocol, his organization was strongly in favour of pressing forward with it, basing its provisions on existing international legal provisions, the general principles of international law, the various declarations and conventions already adopted, and international and national jurisprudence.

17. Five fundamental themes had been raised during the discussion. The first was whether or not NGOs should be empowered to act as complainants and, if so, in what circumstances. His organization was strongly in favour of allowing both national and international NGOs to lodge complaints. Concern had been expressed that NGOs might be used by States as an instrument for interfering in the affairs of other States. That was entirely possible, as proceedings in the Commission on Human Rights had demonstrated. Nevertheless, the risk was worth taking in order to allow civil society to participate in the debate on economic, social and cultural rights.

18. Another point at issue was whether States themselves could bring complaints. His organization strongly believed that States, as signatories of the Covenant, had the right to do so. Similarly, given their responsibilities to the international community, the specialized agencies should not be prevented from acting as complainants. Articles 18 and 19 of the Covenant made their position clear.

19. A further question was which rights under the Covenant were to be covered by the optional protocol? His organization could not support the idea of a protocol à la carte. States parties to the Covenant had an obligation to honour all the rights set forth in it and, likewise, the protocol should cover all those rights. States were, of course entitled to establish priorities among rights, but not to the extreme, for example, of depriving their populations totally of one basic right to the benefit of another.

20. The last point to be dealt with was whether the complainant should be under the jurisdiction of the State against which the complaint was brought. His organization thought that he should not. The notion of co-responsibility, rather than being his organization's invention, was founded on several international instruments, including the Universal Declaration of Human Rights, the Charter and the Covenant itself. If the issue was avoided, there was the risk of leaving a wide opening for impunity in situations where violations of human rights were flagrant. In some countries, such violations were the outcome of policies imposed from outside. The requirement that the complainant must be subject to the jurisdiction of the State against which the complaint was brought was not found in most other cases. The developed countries were fast becoming the arbiters in respect of economic, social and cultural rights, but their own responsibilities should be borne in mind. While the rich countries might violate fewer human rights than the poor countries, they must not be allowed to shirk their own responsibility for violations in the latter. The legal solution to the problem was to make the power to bring complaints universal.

21. Ms. BONNER (International Baccalaureate Organization) said that NGOs were sometimes accused of being Western-oriented and out of touch with people's daily lives. Most large NGOs, however, were made up of national organizations which had grass-root contacts wherever they had members. All the international NGOs had national bases of that kind and had developed an effective procedure whereby they took the list of countries with which the Committee would be dealing, contacted their members in those countries and saw that any relevant information was relayed to the Committee through national groups from the country concerned.

22. Mrs. BONOAN-DANDAN said that the Committee undoubtedly needed to do something about a situation in which, every year, more and more NGOs came to make presentations about the violation of economic, social and cultural rights in particular countries. She did not agree that an optional protocol making provision for complaints by individuals about the violation of human rights would drive Governments away from the Committee. Articles 2 and 3 of the draft optional protocol made it very clear who would be allowed to claim that a right recognized in the Covenant had been violated. In her view, a complaints procedure must be adopted, and she did not think that the countries opposed to it would stay away for very long. They would be subject to internal political pressures as well as persuasion from outside. Unless the Committee had the courage to take the risk of preparing an optional protocol, no one would pay attention to it.

23. Ms. PONCINI (International Federation of University Women) said her organization believed that the optional protocol was important and, furthermore that it was essential that it should cover the provisions of article 2 of the Covenant regarding non-discrimination. She had been somewhat concerned about suggestions that the complaints procedure should be limited to persons, or the representatives of persons, identified as victims. While it was true that legal instruments in the form of ILO Conventions abounded for the protection of the economic and social rights of all people, it was also true that the financial crisis and the constraints ensuing from it had resulted in increasing forms of indirect discrimination, in particular against women, who bore the double burden of paid and unpaid work. Given

the difficulty of pinpointing specific victims in that case, it was of the utmost importance to give priority in the optional protocol to the necessity of having gender-disaggregated data for all social and economic indicators. Only that would make it possible to identify the victims of discrimination and thus allow them access to the complaints procedure.

24. Mr. WIMER ZAMBRANO said that while no disrespect was intended towards NGOs, it must be accepted that it was necessary to distinguish between them for the purposes of the optional protocol. The protocol was intended to serve, not as a memorial of the Committee for future generations, but rather as an effective means of promoting human rights through a judicial procedure. Its content would determine whether or not it was effective. In his view, the protocol should cover only those articles, or parts of articles, of the Covenant which were justiciable. For example, article 15, because of its very general nature, should not be included. That was not to deny the validity of the more general rights, but the optional protocol should be centred on rights that could be defended in law.

25. Mr. CEAUSU said that the Committee's aim was to construct an optional protocol that would be acceptable to as many Governments as possible; the purpose of the current discussion was to solve the controversies that had appeared in the process of drafting it. The future usefulness of the protocol should not be exaggerated but nor should its inherent risks. The only real danger of a protocol with too many defects was that it might discredit the Committee.

26. One of the remaining points of controversy was whether NGOs should be accepted together with individuals as having the power to bring complaints. There was no question of denying the right of the NGOs to be involved in the Committee's proceedings, but care should be taken not to diminish the rights granted to individuals under the Covenant by granting human rights to entities not recognized as having such rights. The right of NGOs in the case in point should be to act on behalf of individual victims, but not on their own behalf.

27. On the question which articles of the Covenant should be covered by the optional protocol, it was his belief that articles 1 and 2 should be included. Self-determination, in article 1, was a right of peoples and peoples were made up of individuals. Non-discrimination, in article 2, should be covered by the optional protocol to the extent that it referred to other rights which Governments had accepted.

28. Although grave doubts had been expressed about the usefulness of the text proposed, he hoped that enough Governments would sign and ratify the optional protocol for it to enter into force and make all Governments aware that individuals had the right to complain to the Committee about violations of their economic, social and cultural rights. The Committee should stop speculating about the risks or usefulness of the draft protocol and concentrate on the issues that remained to be solved. He had been very impressed by the work done by the open-ended working group of the Committee on the Elimination of Discrimination against Women on their optional protocol. Some very interesting ideas had been put forward in the course of a frank and serious exchange of views. It was important that the Committee should complete the task of drafting the optional protocol by the next session.

29. Mr. WIMER ZAMBRANO asked how the Committee would ensure that the various written and spoken proposals were taken into account in the final document? He asked Mr. Teitelbaum how his important idea of classifying the different degrees of application of the various rights was to be incorporated in the final protocol, thus enhancing the Covenant?

30. Mr. ALVAREZ VITA stressed that he would fight for the primacy of the law and ethics. He expressed his wholehearted approval of the comments made by the NGOs; they should be fully taken into account when the protocol was drafted.

31. Mr. RATTRAY said he wished to attempt to elucidate the conceptual framework of the draft protocol. He hoped that it would at a later stage be possible to reconcile divergencies and identify areas of agreement. The draft protocol would need to be examined paragraph by paragraph. The Covenant was not intended to be legally binding, but rather to be used as a tool of persuasion. The draft did contain some inconsistencies. Although the Committee was entitled to take an interest in the interim measures taken by Governments following consideration of their reports, States parties were surely not obliged to abide by the Committee's recommendations if the Covenant was not legally binding. What legal weight did those obligations carry? It must be established whether the Committee's views were exhortatory, recommendatory, persuasive or politically compelling. Some flexibility currently existed, since States could claim that they disagreed with the Committee's recommendations or that they did not have sufficient resources to implement them.

32. Although there seemed to be a consensus that the primary object of rights was the individual, NGOs still had a vital role to play in representing persons whose rights had been violated and in helping to identify false claims. Claims examined by the Committee must have exhausted all local remedies, and that must be verified. How was that to be reconciled with a claim made by an NGO which had no locus standi under domestic jurisdiction? The requirement for locus standi on matters of public interest was being relaxed, but much remained to be done. The establishment of a more comprehensive conceptual framework should allay some of the fears expressed regarding the drafting of the protocol. The protocol's scope and access rules must be properly determined, as must its impact on the open, constructive dialogue held with States parties. Once the judicial nature of the Committee's views was determined, the protocol might not appear so Draconian.

33. Mrs. AHODIKPE supported the draft protocol. She was encouraged by the fact that it seemed to have more supporters than opponents. It was, however, dangerous to permit States to select those rights to which the protocol might be applied. The human rights bodies had, after all, always accorded equal value to all the rights contained in the Covenants. She wondered how the Committee should approach confessions of violations of rights on the part of States parties during the consideration of their reports.

34. In reply to Mr. Wimer Zambrano, Mr. TEITELBAUM (American Association of Jurists) pointed out that the title of a document issued by his organization last December might incorrectly have appeared to suggest that there were some rights which should not be covered by the optional protocol. The issue which

had been debated at an earlier date was how the Committee should address violation by omission to implement measures or to legislate. The following wording might be added: "All rights in the Covenant should be the object of recourse in the framework of the protocol." The protocol should accord equal priority to all rights.

35. Responding to Mr. Rattray, he said that the Committee's function must be non-jurisdictional. It would simply make recommendations of a moral nature and note violations of human rights by particular States parties.

36. The participation of NGOs should not be conditional upon the exhaustion of internal remedies, especially in cases of widespread violation of rights. NGOs must be allowed to bring complaints before the Committee without always needing to represent particular individuals.

37. The CHAIRPERSON observed that important new ground had been covered, but numerous issues remained to be addressed. Regarding Mr. Wimer Zambrano's question on procedure, he suggested that the Committee should initially engage in an informal discussion. A consensus must be reached before the finished protocol was submitted to the Commission, or the differences of opinion must be acknowledged in a commentary annexed to a largely unchanged report to give the Commission an indication of the debates which had taken place since the report had first been published in 1994.

38. The proceedings had been characterized by a note of optimism. Speaking in a personal capacity, he said he was committed to the optional protocol. One effect of the protocol would be to increase States parties' willingness to grant domestic remedies. As Mr. Ahmed had pointed out, complaints would only be referred to the Committee if no domestic forum existed, or if it proved to be unsatisfactory, since countries would prefer some matters not to be referred to the Committee. If the optional protocol was adopted, the relatively few complaints examined by the Committee would have considerable repercussions. The Committee had expressed its willingness to proceed, but the competent political organs would have to reach their own decision. In the meantime, the Committee was able to provide an opportunity for debate.

The public part of the meeting rose at 5.15 p.m.